Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

STEPHEN L. LANGLIE,
Petitioner,

v.

ONAN CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

ISSUE 1

The decisions by the Eighth Circuit in Houghton and Langlie, in which the Eighth Circuit denied a right to a jury trial under ERISA, are contrary to the Seventh Circuit's rulings in Grotteau, Senn and Bugher.

ISSUE 2

The Supreme Court must confirm that a private right of action exists for claims of retaliation under ERISA § 510.

ISSUE 3

The Eighth Circuit failed to recognize that the District Court did not follow the prevailing law when it issued a directed verdict on Petitioner's claim of retaliation under ERISA § 510.

PARTIES TO THE PROCEEDING

Petitioner

Stephen L. Langlie is an individual with no corporate affiliations.

Respondent

Onan Corporation, a division of Cummins Engine Company.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

ARGUMENT FOR GRANTING THE WRIT 5

ARGUMENT ONE
The decisions by the Eighth Circuit in Houghton and Langlie, in which the Eighth Circuit denied a right to a jury trial under ERISA, are contrary to the Seventh Circuit's rulings in Grotteau, Senn and Bugher 6

ARGUMENT TWO
The Supreme Court must confirm that a private right of action exists for claims of retaliation under ERISA § 510 8

ARGUMENT THREE
The Eighth Circuit failed to recognize that the District Court did not follow the prevailing law when it issued a directed verdict on Petitioner's claim of retaliation under ERISA § 510 10

CONCLUSION 14

APPENDIX

Appendix A
Eighth Circuit Opinion, September 30, 1999 . . 1a

Appendix B
District Court Order, August 7, 1998 . . . . . 8a

Appendix C
Eighth Circuit Order Denying Petition for Rehearing and Request for *En Banc* Review, November 2, 1999 . . . . . 9a

TABLE OF AUTHORITIES

Cases

Bugher v. Feightner,
722 F.2d 1356 (7th Cir. 1983), cert. denied,
469 US 822 (1984) 7

Burch v. Coca-Cola Co.,
119 F.3d 305 (8th Cir. 1997),
cert. denied, 118 S. Ct. 871 (1998) 10

Caudill v. Farmland Industries, Inc.,
919 F. 2d 83 (8th Cir. 1990) 10

Grotteau v. Sky Climber, Inc.,
79 F.3d 70 (7th Cir. 1996) 7, 8

In Re Unisys Plan Litigation,
74 F.3d 420 (3rd Cir. 1996) 8

Kinkead v. Southwestern Bell Telephone Co.,
49 F.3d 454 (8th Cir. 1995) 8

Langlie v. Onan Corp.,
192 F.3d 1137 (8th Cir. 1999) 6

McDonald v. Artcraft Elec. Supply Co.,
74 F.Supp. 29 (D.D.C. 1991) 7

McKelvey v. Canteen Corp.,
9 IER 642 (D. Md. 1994) 9, 12

McLean v. Carlson Companies,
777 F.Supp. 1480 (D. Minn. 1991) 8, 9

Mulholland v. Schneider Service Co.,
661 F. 2d 708 (8th Cir. 1981) 10

Reich v. Hoy Shoe Co., Inc.,
32 F.3d 361 (8th Cir. 1994) 12

Ryan v. Board of Police Com'rs,
96 F.3d 1076 (8th Cir. 1996) 10

Seidlitz v. Commissioner of Internal Revenue,
US Tax Court, Doc No. 334-99R
(August 13, 1999) 4, 6, 13

Senn v. United Dominion Indus. Inc.,
951 F.2d 806 (7th Cir. 1992) 7

Shirley v. Chrysler First, Inc.,
970 F.2d 39 (5th Cir. 1992) 12

Smith v. Riceland Foods, Inc.,
151 F.3d 813 (8th Cir. 1998) 11

Smith v. St. Louis University,
109 F.3d 1261 (8th Cir. 1997) 11-12

Stockmen's Livestock Market, Inc. v.
Norwest Bank of Sioux City,
135 F.3d 1236 (8th Cir. 1998) 10-11

UAW v. Midland Steel Products Co.,
771 F.Supp. 860 (N.D. Ohio 1991) 7

Vicinanzo v. Brunschwig & Fils, Inc.,
739 F.Supp. 882 (S.D.N.Y. 1990) 7

Weber v. Jacobs Mfg. Co.,
751 F.Supp. 21 (D.Conn. 1990) 7

Statutes and Rules of Court

28 U.S.C. § 1254(1) et seq. 1

28 U.S.C. § 1331 et seq. 4

28 U.S.C. § 2106 et seq 1

29 U.S.C. § 621 et seq. 7

29 U.S.C. § 1001 et seq. 2, 4

Federal Rules of Civil Procedure 50 3

42 U.S.C. § 2000e et seq. 7

42 U.S.C. § 12101 et seq. 7

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit is reported at 192 F.3d 1137 (8th Cir. 1999). A copy of the Opinion is included in the Appendix at Appendix A at la-7a. The Opinion of the District Court for the District of Minnesota was filed on August 6, 1998. A copy of the Opinion is included in the Appendix at Appendix B at 8a.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its Opinion on June 18, 1999. On October 12, 1999, Petitioner filed a Petition for Rehearing *En Banc* which the United States Court of Appeals denied on November 2, 1999 (App. C at 9a).[1] This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Article VI, Clause 2 Supremacy Clause.

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[1] Citations to "App." are to the appendix filed with this Petition for Writ of Certiorari pursuant to Supreme Court Rule 14(i).

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution of Laws of any State to the Contrary notwithstanding.

* * * *

Employee Retirement Income Security Act
29 U.S.C. § 1001

Part 5 Administration and Enforcement

Sec. 510. Interference with Rights Protected under Act.

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this title, section 3001, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act or the Welfare and Pension Plans Disclosure Act. The provision of section 502 shall be applicable in the enforcement of this section.

* * * *

Federal Rules Of Civil Procedure

Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings

19. Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

STATEMENT OF THE CASE

The facts of this case are uncomplicated. Respondent employed Petitioner for over 35 years, ending in 1995. (App. la). During the last several years of Petitioner's employment, Respondent changed its pension plan - converting from a traditional pension to a "cash-balance pension." (App. 5a-6a). At the time, cash-balance pensions were all but unheard of on the public agenda. However, Petitioner immediately saw the unfairness that these pensions had on older, long-term employees reducing their pensions by over 75%. Petitioner reported this unfairness in correspondence and conversations with the Department of Labor, the Internal Revenue Service, the Equal Employment Opportunity Commission and members of Congress. Id.

After years of calling this illegality to everyone's attention, Petitioner finally succeeded. Recently the

Representative of the Commissioner of the Internal Revenue Service argued in United States Tax Court to have Respondent's pension plan disqualified. See Seidlitz v. Commissioner of Internal Revenue, US Tax Court, Doc No. 334-99R (August 13, 1999) (Answer of the Internal Revenue Service). All because Petitioner refused to sit by and watch Respondent steal his pension benefits.

In the meantime, however, Respondent felt pressure and "discomfort" from Petitioner's actions. Respondent became so concerned about Petitioner's protests that, as the jury agreed, Respondent constructively discharged him in December 1995.

In 1997 Petitioner filed a complaint in United States District Court for the District of Minnesota seeking redress for Respondent's violations of the Employee Retirement Income Security Act (hereinafter ERISA). The District Court had jurisdiction over the original action pursuant to 29 U.S.C. § 1001 and 28 U.S.C. § 1331 because the case presented a federal question arising under ERISA. Without a motion by Respondent, the District Court issued a directed verdict against Petitioner's retaliation claim under ERISA, stating that "it beggars the imagination" how it took [Respondent] several years to get rid of Petitioner after his pension protests began. (App. 6a). The District Court entered judgment on August 8, 1998. (App. 8a).

Petitioner timely filed an appeal with the Court of Appeals for the Eighth Circuit. On September 18, 1999 the Court of Appeals affirmed the District Court's judgment. Ignoring the facts and statutory provisions that make it illegal for an employer to retaliate against an individual who asserts rights under ERISA. The Panel for the Eighth Circuit determined that the ruling by the District Court was not

clearly erroneous. (App. 6a). The Court of Appeals based its conclusion on the fact that Petitioner's assertion of rights took place over a period of several years before being constructively discharged by Respondent. Id Furthermore, the Court of Appeals denied Petitioner a right to a jury trial under ERISA, and refused to reach the issue of whether a private right of action exists under ERISA. (App. 5a-6a). Petitioner's request for *en banc* review was denied on November 2, 1999.

ARGUMENT FOR GRANTING WRIT

ERISA § 510 expressly prohibits employers from retaliating against individuals who assert rights under that statute. The facts are undisputed that Petitioner asserted rights under ERISA. Petitioner wrote letters and lobbied to the Internal Revenue Service, the Department of Labor and members of Congress against what he believed to be Respondent's violations of ERISA. Respondent admits that Petitioner's tireless lobbying caused it "discomfort." Respondent, concerned that Petitioner's efforts would jeopardize its pension plan changes, constructively discharged Petitioner in an effort to silence his protests. Respondent's attempts to silence Petitioner failed. To this day, Petitioner continues to assert rights under ERISA.

Despite these facts, the District Court refused to allow a jury to consider whether Respondent constructively discharged Petitioner in retaliation for assertion of rights under ERISA. In doing so, the District Court stated that it "beggars the imagination" to conceive that a retaliation claim existed under these facts.

It does not "beggar the imagination" at all. Partly as a result of Petitioner's ceaseless protests, the Internal Revenue Service agrees that Petitioner's complaints had merit. See Seidlitz v. Commissioner of Internal Revenue, US Tax Court, Doc No. 334-99R (August 13, 1999) (Answer of the Internal Revenue Service). In Seidlitz, the Internal Revenue Service has requested that the United States Tax Court rescind Respondent's pension's tax exempt status and disqualify the plan amendments, effective as of January 1, 1989, and for plan years ending thereafter – the same pension plan changes about which Petitioner has been protesting for years.

The Supreme Court must remedy the District Court's error and allow a jury to determine whether Respondent constructively discharged Petitioner in retaliation for his assertion of rights under ERISA § 510.

ARGUMENT ONE

THE DECISIONS BY THE EIGHTH CIRCUIT IN HOUGHTON AND LANGLIE, IN WHICH THE EIGHTH CIRCUIT DENIED A RIGHT TO A JURY TRIAL UNDER ERISA, ARE CONTRARY TO THE SEVENTH CIRCUIT'S RULINGS IN GROTTEAU, SENN AND BUGHER.

The Eighth Circuit has held that "there is no right to a jury trial under ERISA." Langlie v. Onan Corp., 192 F.3d 1137, 1141 (8th Cir. 1999); citing Houghton v. SIPCO, Inc., 38 F.3d 953, 957 (8th Cir. 1994).

The Eighth Circuit is incorrect. The Seventh Circuit and District Court's have recognized the right to a jury trial

under ERISA. See e.g., Grotteau v. Sky Climber, Inc., 79 F.3d 70, 72 (7th Cir. 1996) (discussing that a "reasonable jury" could hear claims of retaliation under § 510); Senn v. United Dominion Indus. Inc., 951 F.2d 806 (7th Cir. 1992) (ruling that the Seventh Amendment requires a jury trial on the issue of whether defendants breached a collective bargaining agreement's retiree health obligation in violation of ERISA and LMRA); Bugher v. Feightner, 722 F.2d 1356 (7th Cir. 1983), cert. denied, 469 U.S. 822 (1984) (finding a right to a jury trial for an employee bringing claims under ERISA § 502(a)(3) and LMRA § 301); McDonald v. Artcraft Elec. Supply Co., 74 F.Supp. 29, 35 (D.D.C. 1991) (allowing a jury trial where an employer terminated an employee because the employer did not wish to continue paying medical benefits, and by analogizing ERISA claims to contract claims); UAW v. Midland Steel Products Co., 771 F.Supp. 860 (N.D. Ohio 1991) (noting that ERISA does not expressly preclude jury trials); Weber v. Jacobs Mfg. Co., 751 F.Supp. 21 (D.Conn. 1990) (ruling that under ERISA § 510, an employee is allowed a jury trial when alleging that his termination was due to an employer's interference with benefit rights); Vicinanzo v. Brunschwig & Fils, Inc., 739 F.Supp. 882, 886 (S.D.N.Y. 1990) (outlining that legal damages are not precluded by ERISA § 502).

Furthermore, claims for retaliation in violation of other statutes also allow for the right to jury trial. See e.g. 42 U.S.C. § 2000e et seq.; 29 U.S.C. § 621 et seq.; 42 U.S.C. § 12101 et seq.

The Supreme Court should remedy the conflict among the lower courts and confirm that ERISA § 510 allows for a right to a jury trial for claims of retaliation.

ARGUMENT TWO

THE SUPREME COURT MUST CONFIRM THAT A PRIVATE RIGHT OF ACTION EXISTS FOR CLAIMS OF RETALIATION UNDER ERISA § 510.

The Eighth Circuit refused to address whether a private right of action exists under ERISA for retaliation. Langlie, 192 F.3d at 1141 citing Rath v. Selection Research, Inc., 978 F.2d 1087, 1089 (8th Cir. 1992) ("It is an open issue in this Circuit whether § 510 protects informal complaints or protests relating to plan changes that a participant reasonably believes to be illegal.").

Protection under ERISA § 510 is available for an employee who "has given information or has testified or is about to testify in . . . a proceeding relating to [ERISA]." 42 USC § 1140. ERISA § 1132 provides for causes of action by participants injured by violations of the terms of an ERISA plan, wrongful discharge, and breach of fiduciary duty. See In Re Unisys Plan Litigation, 74 F.3d 420, 442 n. 17 (3rd Cir. 1996). Based upon this statutory framework, given that ERISA guarantees anti-retaliation protection (§ 510), and allows for a private right of action (§ 1132), surely, ERISA § 510 allows a private right of action for claims of retaliation. See e.g., Kinkead v. Southwestern Bell Telephone Co., 49 F.3d 454, 456 (8th Cir. 1995) (analyzing an employee-plaintiff's claims for retaliation under ERISA § 510 under the burden-shifting analysis); Grotteau v. Sky Climber, Inc., 79 F.3d 70, 72 (7th Cir. 1996) (discussing that "reasonable jury" could hear claims for retaliation under ERISA § 510 if a plaintiff survives summary judgment); McLean v. Carlson Companies, 777 F.Supp. 1480 (D. Minn. 1991) (recognizing that a plaintiff has recourse under ERISA § 510 for claims of

retaliation); McKelvey v. Canteen Corp., 9 IER 642 (D. Md. 1994) (allowing a plaintiff to amend his complaint to add claims of retaliation under ERISA § 510). The McLean court found that a retaliation claim under ERISA could exist where discharge was alleged to have been in retaliation for reports of suspected violations of ERISA:

> Plaintiff clearly would have recourse under § 510 had she been discharged in retaliation for commencing a legal action against defendant to correct what she perceived to be violations of ERISA. In view of the express authorization which plaintiff possesses under ERISA to sue to remedy violations of ERISA, the court finds it logical to infer that plaintiff also possesses the right to inform plan administrators of suspected violations of ERISA. The opposite conclusion would provide a strong incentive to plan participants to institute litigation with out first attempting to resolve the issue informally. As well, it would seem anomalous for the court to prohibit actions by plaintiffs who allege to have been discharged for reporting violations of ERISA to their employers while concurrently permitting actions by those who seek to remedy the same violations through legal action.

See 777 F.Supp. at 1484.

Similar to the employees in McKelvey and McLean, Petitioner questioned Respondent's pension changes. Petitioner's opposition to Respondent's pension changes was a right protected under ERISA. Respondent met Petitioner's

challenges to its pension changes with numerous adverse acts -- and as the jury recognized, they constructively discharged Petitioner.

As such, the Supreme Court should recognize a private right of action for claims of retaliation under ERISA § 510.

ARGUMENT THREE

THE EIGHTH CIRCUIT FAILED TO RECOGNIZE THAT THE DISTRICT COURT DID NOT FOLLOW THE PREVAILING LAW WHEN IT ISSUED A DIRECTED VERDICT ON PETITIONER'S CLAIM OF RETALIATION UNDER ERISA § 510.

A. The Eighth Circuit Failed To Follow The Standard For Directed Verdicts.

The prevailing law outlines that a directed verdict is appropriate only "where the evidence is such that . . . there can be but one reasonable conclusion as to the verdict." Caudill v. Farmland Industries, Inc., 919 F. 2d 83, 86 (8th Cir. 1990), citing Mulholland v. Schneider Service Co., 661 F. 2d 708 (8th Cir. 1981). As such, the court must "view the entire trial record in the light most favorable to the non-movant, drawing reasonable factual inferences in its favor," Burch v. Coca-Cola Co., 119 F.3d 305, 313 (8th Cir. 1997), cert. denied, 118 S. Ct. 871 (1998); see also Ryan v. Board of Police Com'rs, 96 F.3d 1076, 1084 (8th Cir. 1996). The cause of action must be submitted to the finder of fact "if there is any substantial evidence to sustain" it. Stockmen's Livestock Market, Inc. v. Norwest Bank of Sioux City, 135

F.3d 1236, 1240 (8th Cir. 1998). Petitioner presented substantial evidence to support his claim of retaliation. Despite this, the District Court granted a directed verdict against Petitioner's claim of retaliation.

In making its decision, the District Court looked at only one fact – the duration and timing of Petitioner's complaints – when compared with his constructive discharge. See Langlie, 192 F.3d at 1141 (stating that "it beggars the imagination" how it took Respondent several years to get rid of Petitioner after his pension protests began).

Contrary to the District Court's circumspect view of the facts, more than one reasonable conclusion can be reached based upon the evidence Petitioner set forth in support of his claim for retaliation as outlined below.

B. More Than One Conclusion Can Be Reached In Reviewing Whether A Causal Connection Existed Between Petitioner's Reports And His Constructive Discharge.

The District Court directed a verdict against Petitioner's claims for retaliation because the Court believed that due to the duration of Petitioner's complaints, no causal connection could exist between Petitioner's complaints and his constructive discharge. However, the prevailing law directs that such a causal link may be shown not only through proximity in timing, but also through other implications of retaliatory motive. See Smith v. Riceland Foods, Inc., 151 F.3d 813, 820 (8th Cir. 1998) (noting that a causal connection can be shown by demonstrating management knowledge about complaints, and discussions between the plaintiff and management about plaintiff's protected activities); Smith v.

St. Louis University, 109 F.3d 1261, 1266 (8th Cir. 1997) ("The passage of time between events does not by itself foreclose a claim of retaliation.") (emphasis added); Reich v. Hoy Shoe Co., Inc., 32 F.3d 361, 368 (8th Cir. 1994) (agreeing that once an employer has knowledge that an employee made complaints to an outside agency, "[I]t is beyond question that the employers make employment decisions based upon what they actually know to be true."); Shirley v. Chrysler First, Inc., 970 F.2d 39, 42 (5th Cir. 1992) (outlining that the "consideration of [time] is part of our analysis [in finding a causal connection], but not in itself conclusive of our determination of retaliation."); McKelvey v. Canteen Corp., 9 IER 642, 643 (D. Md. 1994) (agreeing that time is but one factor in determining the existence of a causal connection). In Petitioner's case, the District Court ignored the prevailing law, and issued a directed verdict holding that lapse of time, standing by itself, absolved Respondent of liability.

The District Court focused on a complaint of age discrimination and retaliation made by Petitioners in 1984. However, Petitioner's complaints about the pension changes did not begin until 1988. Furthermore, while Petitioner began to question the pension changes in 1988, his protected activities continued and intensified in 1995 – at which time the IRS and the Department of Labor began to take notice of Petitioner's reports.

Petitioner asserts that the timing of his intensified complaints in 1995 coincided close in time to his constructive discharge later that same year. As such, a reasonable conclusion is that once Respondent realized that Petitioner's contacts with the IRS in 1995 could cause problems in its pension changes, they quickly terminated him.

While Respondent initially attempted to ignore Petitioner's pension protests, it could not do so indefinitely. Respondent admitted that it eventually started to feel "discomfort" from Petitioner's actions. Respondent also admitted that it considered Langlie to be "litigiously inclined" because of his reports to governmental agencies. Respondent became so concerned that Langlie's reports to the IRS and Department of Labor might actually be effective, that they attempted to silence Petitioner by constructively discharging him.

To Respondent's surprise, however, Petitioner continued to press his cause even after his constructive discharge. Finally, the Internal Revenue Service agreed with Petitioner that Respondent's pension changes did not comply with IRS requirements. See Seidlitz v. Commissioner of Internal Revenue, US Tax Court, Doc No. 334-99R (August 13, 1999) (Answer of the IRS requesting that the Tax Court rescind Respondent's pension's tax exempt status and disqualify the plan amendments, effective as of January 1, 1989, and for plan years ending thereafter).

It does not "beggar the imagination" at all that Respondent terminated Petitioner because he was complaining about Respondent's pension changes. Respondent masked its pension changes, believing that its employees could not see through the pension theft put in place by the cash-balance pensions. However, to Respondent's consternation, Petitioner saw through the intricately conceived mask. Because Petitioner did not give up his fight for fairness related to his pension, Respondent terminated him. Merely because Respondent tried to ignore Petitioner until 1995 before it attempted to silence his complaints does not eliminate the fact that a causal connection exists between Petitioner's protest and his constructive discharge.

Based upon the evidence Petitioner presented to the Court, it is reasonable to conclude that Respondent discharged Petitioner because of his reports to the IRS and the Department of Labor complaining about the pension changes. As such, it was improper and against the prevailing law for the District Court to issue a directed verdict on Petitioner's claims of retaliation under ERISA § 510.

The Supreme Court should recognize the Eighth Circuit's failure to reinforce the prevailing law related to directed verdicts, and should grant Petitioner's Petition for a Writ of Certiorari on this issue.

CONCLUSION

Based upon the foregoing, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

/s/_____

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[Filed September 30, 1999]

No. 98-3638

Stephen L. Langlie,	)
Plaintiff- Appellant,	)
	)
v.	)
	)
Onan Corporation,	)
Defendant - Appellee.	)
	)

Submitted: June 18, 1999

Appeal from the United States
District Court for the
District of Minnesota.

Before LOKEN, BRIGHT, and ROSS, Circuit Judges.

LOKEN, Circuit Judge.

In late 1995, Onan Corporation implemented a reduction in force and eliminated the position of Stephen L. Langlie, a 62-year-old employee. Langlie commenced this

action, alleging unlawful age discrimination and retaliation. After trial, a jury found that Langlie was not discharged on account of his age, and the district court[1] found insufficient evidence of unlawful retaliation. Langlie appeals, arguing there was overwhelming evidence of age discrimination and retaliation for his years of informal protests against adverse changes in Onan's pension plan benefits. He also argues there were prejudicial evidentiary and jury instruction errors by the district court. We affirm.

I. The Jury's Age Discrimination Verdict.

Langlie argues the district court erred in denying his post-trial motion for judgment as a matter of law or a new trial because the jury verdict is contrary to the great weight of evidence showing that age was a motivating factor in Onan's decision to eliminate Langlie's position. We review the evidence in the light most favorable to the jury's verdict and affirm unless that evidence "is susceptible of no reasonable inference sustaining the jury's determination." Jones Truck Lines, Inc. v. Full Service Leasing Corp., 83 F.3d 253, 257 (8th Cir. 1996). Our focus is primarily on the jury's resolution of the ultimate question of fact -- whether Onan intentionally discriminated against Langlie on account of his age. See Ryther v. Kare 11, 108 F.3d 832, 849 (8th Cir.) (en banc) (Loken, J., writing for a majority on this issue), cert. denied, 521 U.S. 1119 (1997).

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[1] The HONORABLE JAMES M. ROSENBAUM, United States District Judge for the District of Minnesota.

Onan presented evidence that, after its parent company mandated a ten percent reduction in force, Onan decided to eliminate one engineering position in Langlie's department. Langlie was chosen after an objective evaluation of all the engineers because he had a relatively low performance ranking, his projects were substantially completed, and he lacked design and computer skills necessary for future work. There was evidence that Langlie survived earlier reductions in force in 1985, 1989, 1992, and 1994 in which younger employees were terminated. In addition, when Langlie refused to move with his department to Alabama in 1993, Onan transferred him to another department rather than terminate him. Langlie presented evidence that he was qualified to replace another engineer, his projects were not substantially completed, he had a favorable performance review in April 1995, and Onan's performance rankings for the reduction in force were subjective. He also testified that Onan denied him computer training it made available to younger employees and delayed providing updated computer equipment. Viewing the trial evidence as a whole, we agree with the district court that the evidence was more than sufficient to permit the jury reasonably to find in favor of Onan on Langlie's age discrimination claim. See generally Holley v. Sanyo Mfg., Inc., 771 F.2d 1161 (8th Cir. 1985). His motion for judgment as a matter of law or for a new trial was properly denied. See Jones Truck Lines, 83 F.3d at 258 (denial of new trial based on sufficiency of the evidence is "virtually unassailable on appeal").

II. The Disparate Impact Directed Verdict.

Langlie appeals the district court's refusal to submit his disparate impact age discrimination claim to the jury.

Disparate impact claims challenge "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one [protected] group . . . without adequate justification." Houghton v. SIPCO, Inc., 38 F.3d 953, 958 (8th Cir. 1994). "To prove discrimination under this theory, a plaintiff must identify . . . a facially-neutral employment practice, demonstrate a disparate impact upon the group to which he or she belongs, and prove causation." Lewis v. Aerospace Community Credit Union, 114 F.3d 745, 750 (8th Cir. 1997), cert. denied, 118 S.Ct. 1392 (1998). To prove a prima facie case of causation, "plaintiff must offer statistical evidence of a kind and degree sufficient" to raise an inference that the practice in question has caused significant adverse effects on the members of a protected group because of their membership in the group. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988).

On appeal, Langlie relies upon the trial testimony of his expert statistician, who analyzed Onan's terminations between 1992 and 1997 and opined that older engineers were involuntarily terminated more often than would be expected compared to Onan's younger engineers. However, Langlie failed to link this testimony to a facially neutral employment practice. He refers in his brief generally to Onan's reduction-in-force decisions, citing Thomas v. First Nat'l Bank of Wynne, 111 F.3d 64, 66 (8th Cir. 1997). But he was terminated in the 1995 reduction. Statistics based upon all terminations from 1992 to 1997 do not measure the impact on Onan's work force of that specific reduction, and Langlie has not cited evidence that the 1995 reduction in force had a disparate impact on Onan's older employees. To the extent that he also relies on the distinct argument he made to the

district court -- that Onan's use of performance improvement plans had a disparate impact on its older workers -- we agree with the court that he did not prove a substantial statistical disparity. Thus, we agree with the district court that Langlie failed to present a prima facie case of disparate impact discrimination.

III. The ERISA Retaliation Claim.

In the late 1980's, Onan made changes to its pension plan. Langlie filed a complaint with the Minnesota Department of Human Rights and then became a leader of a group of employees who complained internally to Onan management that these changes would reduce the pension benefits that Onan previously led its older workers to expect. When Onan did not rescind the changes, the group took their complaints to the United States Department of Labor, the Internal Revenue Service, the EEOC, and members of Congress. These protest activities continued into 1995, the year of Langlie's termination. He claims that the termination violated § 510 of the Employees Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140, which provides that it is unlawful "to discharge . . . a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan."

It is an open issue in this Circuit whether § 510 protects informal complaints or protests relating to plan changes that a participant reasonably believes to be illegal. See Rath v. Selection Research, Inc., 978 F.2d 1087, 1089 (8th Cir. 1992). After considering Langlie's evidence at trial, the district court assumed that § 510 provides a claim for retaliation based on informal protests and ruled that Langlie's

claim fails because there is insufficient evidence Onan retaliated against Langlie for his years of protesting Onan's pension plan changes. "[I]t beggars the imagination," the court explained, "that it took [Onan] years to get rid of a troublemaker if the troublemaker they were unhappy about was complaining about an ERISA plan."

On appeal, Langlie argues that § 510 encompasses retaliation against informal complaints and protests and therefore his retaliation claim should have been submitted to the jury. However, there is no right to a jury trial under ERISA. See Houghton, 38 F.3d at 957. The district court found that Langlie was not terminated in retaliation for his complaints about pension plan changes. This finding is not clearly erroneous given the evidence that Langlie began to question pension changes in 1988 and survived numerous reductions in force in the ensuing years despite continuing his informal but vigorous protests. See Figgous v. Allied/Bendix Corp., 906 F.2d 360, 362 (8th Cir. 1990) (standard of review). Accordingly, without reaching the issue of law we left open in Rath, we affirm the dismissal of Langlie's ERISA retaliation claim.

IV. Instruction and Evidence Issues.

Langlie argues the district court erred in instructing the jury, "You may not return a verdict for plaintiff just because you might disagree with defendant's conduct or believe it was harsh or unreasonable." This is Instruction 5.94 from the MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE EIGHTH CIRCUIT (1998), the Business Judgment instruction. We have expressly held that, in employment discrimination and retaliation cases, "a business judgment

instruction is crucial to a fair presentation of the case, and the district court must offer it whenever it is proffered by the defendant." Scamardo v. Scott County, 1999 WL 619056, at *3 (8th Cir. Aug. 17, 1999). The district court did not abuse its discretion in giving this instruction and in declining to give additional instructions proposed by Langlie.

Langlie argues the district court abused its discretion by limiting employee testimony about adverse treatment by Onan, excluding charts prepared by Langlie showing the adverse impact of Onan's practices on employees over forty, excluding evidence of Onan's hiring and firing of employees in 1996, and restricting his testimony relating to pension plan protesting. However, with the exception of one letter to a United States Senator, which was excluded as cumulative or irrelevant hearsay, Langlie does not cite to the record where he offered this evidence, as Fed. R. App. P. 28(a)(7) requires. Therefore, he has not established that the court committed a clear and prejudicial abuse of discretion. See Hastings v. Boston Mut. Life Ins. Co., 975 F.2d 506, 510 (8th Cir. 1992) (standard of review).

The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

[Filed August 7, 1998]

No. 97-CV-239 (JMR/FLN)

Stephen L. Langlie,
Plaintiff,

v.

Onan Corp.,
Defendant,

ORDER

On August 6, 1998, the jury returned a verdict in favor of the defendant, Onan Corp. The Clerk of Court is hereby instructed to enter judgment in favor of the defendant in this matter.

IT IS SO ORDERED.

Dated: August 6, 1998

/s/
JAMES M. ROSENBAUM
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Filed November 2, 1999]

No. 98-3638MNMI

Stephen L. Langlie, *Appellant*,	)
v.	)
Onan Corporation, *Appellee*.	)

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

November 2, 1999

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit